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SUPREME COURT OF THE UNITED STATES.

Filed Oct. 30, 1899.

No. 369

THE BOARD OF LIQUIDATION OF THE CITY DEBT AND THE DRAINAGE COMMISSION OF NEW ORLEANS, Plaintiffs in Error,

vs.

THE STATE OF LOUISIANA, ex rel. ALBERT B. WILDER et al., Defendants in Error.

Writ of Error to the Supreme Court of Louisiana.

Brief for the Board of Liquidation of the City Debt, Plaintiff in Error.

Motion to Dismiss or Affirm.

October, 1899.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. ———

THE BOARD OF LIQUIDATION OF THE CITY DEBT AND THE DRAINAGE COMMISSION OF NEW ORLEANS, PLAINTIFFS IN ERROR,

versus

THE STATE OF LOUISIANA, EX. REL., MISS L. B. WILDER ET AL., DEFENDANTS IN ERROR.

Writ of Error to the Supreme Court of Louisiana.

BRIEF FOR THE BOARD OF LIQUIDATION OF THE CITY DEBT, PLAINTIFFS IN ERROR, IN REPLY TO THAT OF THE DEFENDANTS IN ERROR, IN SUPPORT OF THEIR MOTION TO DISMISS OR AFFIRM.

Defendants in error argue at length and cite authorities to the effect, that the opinion of the state supreme court is a part of the record, and may be examined by this court, for the purpose of ascertaining the grounds upon which the lower court based its decree; this to determine whether or not, the case was decided upon any

ground or grounds within the reviewing power of this court.

It will be sufficient to say, that plaintiff in error in no respect disputes any of these propositions, it having been expressly decided in Crossley vs. New Orleans, 108 U. S., 105, Crescent City Live Stock Company vs. Butchers' Union, 120 U. S., 141–146; New Orleans Water Works Co. vs. Louisiana Sugar Co., 125 U. S., 27, and Egan vs. Hart, 165 U. S., 189, that in cases coming from the Supreme Court of Louisiana, the opinion of the court, as presented by the record, may be examined here; to determine whether or not the judgment can be reviewed.

So far from disputing the soundness of the contention of defendants in error in this respect, plaintiffs in error rely upon the *opinion* of the Supreme Court of Louisiana, as a complete demonstration of the errors complained of in its *decree;* the former, while extending the fullest recognition to every federal right set up by the defendant boards, is bereft of all significance by the *decree*, which, in effect, necessarily denies them.

Upon the assumption that the opinion is open for examination, for the purpose of determining whether or not "the decision" of the court below is adverse to any right or claim set up under the constitution of the United States, defendants in error declare, that if upon examination, it should appear that the same has been "recognized and accorded to the party claiming it," manifestly there is no error that this court is called upon to review, and the writ should be dismissed.

The vice of this argument is the same which is found in the decree of the state court; of course there is no dispute here, that if the rights founded upon the constitution of the United States had been "recognized," by the court *a qua*, this court would have no jurisdiction by writ of error; but the recognition in view, is one that would have at least some semblance of meaning; that which defend-

ants in error attribute to the finding of the Supreme Court of Louisiana is altogether imaginary; a purer fiction could not be conceived; the opinion of the court declares that the defendant boards can not do, what the sole object of this suit is to compel them to do; but after reaching this conclusion in a most voluminous *opinion*, it renders a *decree* ordering the defendants to do the precise thing, which the opinion declared they had no right to do; if the presence of a federal question, decided adversely to the party raising it, can be made more obvious than by a mere reading of the defendants' answer, and then the decree, surely the sharp contrast of the former with the opinion rendered in support of it, it is not easy to perceive how.

As has been said, in the other brief filed by the Board of Liquidation, this is not a case where any nonfederal defense is made, nor is it one upon which any ground of the lower court's decree is nonfederal in character.

The Board of Liquidation raised no single defense that was not solely federal in character; no other issues were dealt with by the opinion of the court below; in the face of the defenses grounded solely and exclusively upon the constitution of the United States, it was impossible for the court to decree in favor of relators, without overriding the federal defenses; the state Supreme Court did not hold that a single one of the contracts which it was claimed were impaired by article 317 of the constitution of 1898, did not exist; on the contrary, they were recognized as being in full force and effect, and the court sought to find a method by which relators could be awarded some kind of relief, without coming in collision with the federal constitution; it is but the simple truth to say, that this effort has entirely failed of its purpose; the *opinion* says, that the bonds authorized by article 317 can not be issued except under certain limitations; but its *decree* orders the sale of the bonds, without any of the restrictions so freely announced by the *opinion*, and directs

their issuance and sale without any condition or restriction whatsoever; the *opinion* and *decree* are irreconcilably inconsistent; if the former is a correct statement of the law, the decree can not be sustained for a moment; if the decree be a correct solution of the controversy, the opinion is a mere nothing; the federal questions are not evaded by the *opinion;* on the contrary, they are fully met and passed upon, in every instance, favorably to the Board of Liquidation; it is only fair to say, that the *opinion*, so far as relied upon to support or justify the *decree*, might as well have been omitted; as a matter of fact, the decree in such case would have had an appearance of strength, which in fact is entirely wanting, preceded as it is, by an opinion which shows that it is hopelessly erroneous.

Touching the authorities relied upon by defendants in error for the dismissal of this writ of error, their application is assumed to result from an examination of the state court's opinion here; the circumstance that plaintiffs in error, understand that an examination of the opinion gives point and emphasis to the jurisdiction of this court, while defendants in error insist that it shows an entire want of jurisdiction, is only the familiar case, of the same facts telling radically different stories to different minds; the theory of defendants in error is, that because the *opinion* of the court is favorable to plaintiffs in error, sustaining, as it does, every constitutional right they set up, that they have nothing to complain of; the fault of this reasoning is, that due effect is not given to the *decree* of the court, which, being the only form in which the state court could either enforce or deny the rights set up by plaintiffs in error, could not have been rendered, if any real recognition at all, was given to the rights of plaintiffs in error; this decree is adverse to every defense made by plaintiffs in error, every one of which was founded upon the constitution of the United States; in

point of fact, the soundness of the constitutional grounds of defense set up by plaintiffs in error, repeatedly declared by the opinion, is the merest mockery, when placed alongside of a decree absolute in its terms, incorporating none of the conditions, by the observance of which only, the opinion declares, defendants in error would be entitled to any relief; these conditions, were named by the opinion, for the expressed and only purpose of saving the plaintiffs in error, the rights which they claimed under the federal constitution; in other words, the opinion declares, that article 317, directing the sale of a sufficient number of Constitutional Bonds to pay relators' claims, could only be carried out by subordinating these bonds, and postponing their payment, both in interest and principal, to all contract rights in existence when the constitution of 1898 was adopted; that is to say, that the bond to be issued was to be inferior in character to all Constitutional Bonds, or contracts entitling any person to the same, and to all bonds and contracts made by the Drainage Commission prior to May 12th, 1898, when the constitution of that year became operative; in this view the *opinion* contains unquestioned recognition of all the federal rights claimed, and in this regard is free from objection, except that it creates a class of bonds unknown to the law, or to the constitutional amendment of 1892, under which article 317 directs their issuance, and which were never asked for by relators; but to what does this involved recognition, with its confusing results, amount, in the face of the *decree*, which binds the defendants absolutely, and omits all reference to any condition or limitation, of any character whatsoever, but which directs the sale of bonds as contemplated by article 317 without any condition? Under this decree, the rank of the bonds would be concurrent with that of all other Constitutional Bonds, and would be paid before, thus making them paramount, and not subordinate, as the opinion says they

must be, to all contracts and bonds made by the Drainage Commission, as these are payable out of the surplus, after all constitutional bonds are provided for; the *opinion*, declaring that no bond for the purposes sought by this suit can be made equal or concurrent with any contract obligation in existence prior to the going into effect of the constitution of 1898, is followed by a *decree* which places them upon the same footing as all other Constitutional Bonds.

The *decree* of the Supreme Court of Louisiana can not in any sense rest upon any ground independent of the federal questions involved; the opinion in support of the decree notices, expressly or by implication, no such ground, or question; the *opinion* propounds a theory by which relators may be awarded in this suit, which is for a mandamus, a relief which they do not seek, and which was not given to them by article 317, without interference with prior contract rights; the *decree* on the other hand, which the defendant must obey, unless it be reversed, requires it to violate every federal right which is pleaded in its answer; it is the decree, and not the opinion, which binds the defendant, and the directions of which it must follow; the latter ignores not only the federal rights claimed by the defendant, but also the opinion, which sets out the reasoning, in support of the decree, that the state Supreme Court considered that in the decree, was to be found its real decision of the case, and that the opinion was to have no effect upon it, is conclusively shown by the circumstance that an application for a rehearing made by plaintiff in error, which simply asked that all doubt be removed, by the court incorporating in its decree the conditions announced in such abundance by the opinion, was, after being held under advisement for many weeks, refused, without a word of comment or explanation upon this point; as a matter of fact, the opinion refusing the re-

hearing is barren of any reference to this ground, upon which the rehearing was asked.

Returning, however, to the authorities relied upon by defendants in error, there is a total want of application of any one of them to the present controversy.

In Eustis vs. Bolles, 150 U. S., 362, the facts were these: Bolles, the defendant, filed a petition of insolvency in a state court; Eustis, a creditor, proved a claim in the insolvency proceedings, and voted for assignees of the insolvent. In response to notice of an application for discharge, he appeared in the state court and opposed the same on the ground that the composition act was unconstitutional, and also that it was passed after the creation of his debt, and hence in violation of the contract clause of the constitution of the United States; subsequently Eustis received, in the insolvency proceedings, one-half of his debt, and signed a receipt setting forth that it was according to the composition formed by the courts. Eustis subsequently brought a suit for the recovery of the unpaid half of his original debt; in defense of this suit were pleaded the proceedings in insolvency, the offer of composition, its acceptance by the majority, in number and value, of the creditors, the discharge of the insolvents, and the acceptance by Eustis of the amount due him under the composition. The jurisdiction of this court was sought to be upheld on the ground that the insolvent or composition act under which Bolles made his surrender having been passed subsequent to the making of the contract out of which Eustis' claim arose, and hence was in violation of the contract clause of the federal constitution. It was said by this court (p. 368) that, upon such a state of facts—that is, the defendant relying upon his discharge under a state insolvent law passed subsequent to the creation of the indebtedness claimed, the claim presented a federal question, which, if adjudged by the state court adversely to the plaintiff, it would be the duty of this

court to consider the soundness of such judgment; but that it appeared that Eustis had accepted and received the money which had been awarded him as his portion under the insolvency proceedings, that his cause of action could not thus be taken away from him, without his consent, by proceedings under statutes of insolvency passed subsequently to the possession of his right; but that the action of Eustis, in so accepting and receipting for his dividend, was a waiver of his right to object to the validity of the insolvency proceedings; the wide dissimilarity between the case cited and that before the court is the conspicuous feature of the slightest comparison of one with the other; in the Eustis case the court held, that although plaintiff in error did originally have a right protected by the constitution of the United States, the denial of which by the state court would have been subject to review by this court, he had done acts which amounted to the waiver of such right, and that the decree of the state court, grounded upon such waiver, did not decide a federal question; that it was not for this court to inquire whether that view of the case was sound or not, as it was broad enough to support the final judgment, without reference to the federal question.

The slightest examination of the record here, discloses that the cited case presents no single feature in common with the instant case; the state supreme court here, has not found that the contracts which plaintiffs in error sought to protect from impairment, did not exist; it did not hold that any right under them had been waived; it recognized, and affirmed their present binding force: it's opinion points out a course by which relators could be awarded relief, without impairing the obligations of the contracts set up by defendant in the court below; it then ordered the satisfaction of the claims of defendants in error, in a mode radically different from that outlined in its opinion, and this decree, which neces-

sarily involves the doing of all which the opinion declares can not be done, can not be enforced, as it stands, without impairing the obligation of all the contracts which the court's opinion declares can not be impaired.

If it be true, as declared in the brief of defendants in error, page 16, that the language of the opinion controls the decree, the complaint of the plaintiffs in error apparently loses much of its force, but this statement of relators' views of the effect of the state court's unconditional judgment in their favor has now found its way into the record for the first time; the able counsel of defendants in error, in their brief, pages 16 and 17, use the following terse and pointed language:

"It suffices to say, that the language of the opinion controls, and whenever the question is presented for determination, as to the relative right of the bonds issued, and those to be issued under the article of the constitution, where they come in conflict, the determination and adjustment of their relative status will be controlled by the opinion and decree in this cause."

The opinion of counsel is that the opinion controls; their suggestion is that determination of the conflict be postponed until some time subsequent to the issue of the bonds, when a conflict would arise; this, it is respectfully submitted, would be not only a shirking of duty, but a blow to the credit of the city of New Orleans, in requiring it to issue a series of bonds, the status of which was in doubt, almost inevitably requiring litigation to remove; the precise character of the bond should be known, not only to the Board of Liquidation, but to the public, to which it would be offered for sale: the former that it might know exactly to what it was giving its sanction, and the latter to be informed as nearly as possible the value of the bond offered for sale, and which they might be induced to buy; to place upon the market a series of bonds of a doubtful character, resulting from a variance between the opinion

and decree in this case, might result in their not being sold at all, or only in proposals to buy at a price less than par, which, under section 1 of act 110 of 1890, the Board of Liquidation would be compelled to reject; if the status of the bonds, the issuance of which is directed by the state supreme court, were the same as that of the other Constitutioual Bonds, they would command the high premium now paid for the Constitutional Bonds already issued, and thus an amount of bonds in principal much less than relator's claims would be sufficient to pay the latter; it is earnestly insisted that the status of the bonds to be issued here, if any are to be issued at all, should at any event be determined now in the present suit; but be it borne in mind, that the defense raised by the Board of Liquidation is that the provisions of the constitutional amendment of 1892, act 110 of 1890, and the drainage commission acts of 1896 and 1898, furnish insuperable objections to the issuance of any bond at all under article 317 of the constitution of 1898.

If the state supreme court did not consider that the opinion controlled the decree, but, on the contrary, had in mind a complete separation of the two, and that the decree was to have an effect, according to its terms, that is to say, that the bonds to be issued in obedience thereto were not to be subordinated to any obligation payable out of the one per cent. tax, but that they were to be Constitutional Bonds of the precise character contemplated by article 317, that is, the same as the Constitutional Bonds already issued, that they should be burdened with no condition or limitation as to their rights, is shown by the fact that a rehearing was denied plaintiffs in error, which was based upon the theory that the court would find no objection to reconciling its decree with the opinion delivered in support of it; that the latter should contain the conditions and limitations which the opinion had declared, must be observed in the issuance of the bonds; this was in effect

nothing more than to ask the court to declare what defendants in error in their brief now claim, namely, that the opinion was intended by the court to control the decree, but this was refused without assigning any reason whatever, and in fact, without noticing the ground at all.

This action of the court is unintelligible, except upon the ground that its purpose was to give to the decree the only effect which under its terms it could possibly have, and this was the reverse of the doctrine announced by the opinion; it is impossible, therefore, to be give to the decree an interpretation which the court rendering it declined to place upon it; the refusal of the petition for a rehearing, based upon the assumption that the opinion was intended to limit and control the decree, is as clear and emphatic a declaration by the court of the reverse as could be made.

The case of Krieger vs. Shelby R. R. Co., 125 U. S., 46, in the appreciation of the writer, simply holds, that in a case where the highest court of a state defines rights conferred by certain state statutes, and bases its judgment upon the construction and effect of earlier statutes, upon grounds which would have been equally controlling, if the subsequent acts should not have been passed, there is no jurisdiction in this court by writ of error; it may be said, that this is no more than a statement of the familiar rule, that where a judgment of the highest court of a state is based upon grounds which include no federal question, or in other words, where it defines rights arising under statutes of a state, or where an interpretation is placed upon the latter, no federal question is presented and this court is without jurisdiction; if this view be correct, the Krieger case would apply here only to that part of this controversy in which defendants in error deny the capacity of the Board of Liquidation to raise the defense which is set up; whether it can or not is a question of local law, dependent upon the powers and rights given it by the state statutes by which it was created and is

governed; the state court in the present case has held that the board has full authority to make all of the defenses it has advanced,

Counsel for defendants in error misconstrue the ground of attack against the decree of the state supreme court; this latter is directed not against the *form* in which the court's decree is framed, but against the whole decree itself; the only decree which, in the judgment of plaintiffs in error, could have been made, was one of unqualified rejection of relators' demand, and the dismissal of their suit; the incorporation in the decree of the conditions and limitations set out in the opinion is and only could be a makeshift, and was dealt with by plaintiffs in error in their application for a rehearing in the court below, only because of their desire to terminate the controversy there, even to the extent of sacrificing their own views, by endeavoring to obtain from that court such a decree as might be free from constitutional objection; the only desire of plaintiffs in error is, that all rights by law committed to their care and administration shall be protected, and while, as a matter of law, they were entitled to a judgment absolutely denying all relief to relators, one, which like the opinion, would subordinate to all contract rights, naming them specifically, existing prior to the adoption of the constitution of 1898, the bonds to be sold to pay relators' claims, and postponing their payment, either in principal or in interest, until and after the satisfaction of all such rights, was all that was asked from the state supreme court on the rehearing; but this was refused, in fact not even referred to in the short opinion by which the rehearing was denied; but even if this had been granted, the judgment would then have been one not differing only in form from the one already rendered, but entirely different in character, in fact bearing no resemblance whatever to that produced by the decree complained of.

It is argued in the brief of defendants in error, that the

Board of Liquidation has no right or authority to prosecute this writ of error, for the reason that it is nothing more than an arm of the government of the city of New Orleans, charged with the application of the city's property and its assets, and such taxes as it is entrusted with, to the payment of the city's bonded indebtedness; that it is at all times subject to constitutional or legislative direction, with the right reserved to those whose interests are affected, to prevent any encroachment upon their rights by legislation, constitutional or otherwise, which in effect or operation would impair the obligation of existing contracts; and in support of these views they cite Board of Liquidation vs. L. & N. R. R., 109 U. S., 228.

It has been argued in the original brief for plaintiffs in error, pages 30 and 31, that the board's right to set up in the state court the defenses here pleaded had been upheld by the state supreme court in this case, and that this closed all further discussion of that phase of the controversy; if the board had the right to set up in the state court the defenses founded upon the constitution of the United States, it would have an equal right to prosecute a writ of error, and obtain in this court relief from a denial of any federal right by the decree of the highest court of the state; further, the board derives all of its rights and powers from statutes of the state of Louisiana, the interpretation of which is primarily a function of the highest court of that state; this has affirmed the full right of the board to stand in judgment, as it has done below, and to plead, and to have adjudicated, in the courts of the state of Louisiana, the federal rights and claims which are set up in its answer; this court, by a long series of decisions, has declared, that it would adopt and follow the interpretation of a state statute which has been put upon it by the highest court of the state in question.

See authorities cited on page 33 of original brief of plaintiffs in error.

Therefore, the right of the board to appear herein having been recognized by the highest court of the state of Louisiana, will not be inquired into by this court, and the right to defend, as has been done in the courts below, of necessity carries with it the right to bring this case here for review, if the requirements for jurisdiction be otherwise shown.

The facts and other conditions of the case in 109 U. S. are radically different from the one in hand: in the cited case, litigation was pending between the city and the railroad company, concerning the validity of a right of way granted over certain batture property by the former; during the pendency of the same the Board of Liquidation was created, by act 133 of 1880, section 5 of which provided, that the city should turn over to the board all of its property not dedicated to public use, which the board was empowered to dispose of, on such terms and conditions as might be deemed favorable, to carry out the purposes of its creation; in this condition, a compromise of the pending litigation was made by the city and the railroad company, under which the city received forty thousand dollars in money, and a decree entered perpetually enjoining it from interfering with the company's user of its grant of rights; the Board of Liquidation claimed that the forty thousand dollars should be turned over to it by the city, under the act of 1880, it having been decided by the Supreme Court of Louisiana, in Board of Liquidation vs. City of New Orleans, 32 La. An. Rep., 915, that a franchise or right of way granted a railroad was property, in the sense of section 5 of the act of 1880, and that the sum realized by the city as above should be turned over to it, to be applied to the reduction and retirement of the city's bonded debt; the board, however, not approving the compromise, instructed its attorney to take proper steps to have it set aside, to op-

pose the dismissal in this court of the city's appeal in the suit thus compromised, and to hold the fund decreed from the same, so as to restore it if the compromise was annulled, or to claim it for the board if it should become a finality (see page 226); a motion to dismiss being subsequently made by the railroad company, based upon a stipulation signed by the city attorney, pursuant to the terms of the compromise, this was opposed by the Board of Liquidation, on the ground that during the pendency of the appeal, authority over the subject matter of the controversy had been transferred from the city council to the board, and hence that the compromise was not binding; the board asked leave to prosecute the appeal in the name of the city; the matter was set down for argument at the next term of court; in the interim, complying with the condition imposed by the court, for the institution of a suit by the board in a court of competent jurisdiction, to set aside the appeal, the bill filed for this purpose in the Circuit Court was dismissed; this decree was brought up to this court by appeal; the court held that the city council had full authority to make the compromise; that by section 8 of act 20 of 1882, the city was expressly authorized to sell, in lots or squares, so much of the batture, from time to time, as might not be required for public purposes; and that by act 81 of the same year, whenever the city should contract with private corporations or individuals for the sale or lease of public privileges and franchises, such as the right of way for street railroads, or for other public undertakings, within her legal power and control, and that the price paid for the sale or lease of the same should be applied to the performance of works of public improvement; that all this was entirely inconsistent with the provisions of section 5 of the act of 1880, which was thereby repealed, as regards the control and disposition of batture property, directly operating upon

the powers of the board over the subject matter of the ccmpromise in question, and left the city council free to act in the premises; that all the legislation involved related to the distribution of the powers of the city government among different departments; the question presented no contract rights needing protection; that if the effect of section 5 of the act of 1880 was to pledge property not dedicated to public use, to secure the payment of the bonded debt, there had been nothing to prevent the legislature from revoking the pledge, until contract rights had in some way intervened, which, as a matter of fact, had not occurred, as it was agreed that no bonds had ever been issued by the board, under the authority or upon the faith of the act of 1880, nor the other bond act of 1882, before act No. 81 of that year, had been passed.

The court concluded that it resulted from the whole legislation, that the board had no power over the subject matter of the compromise, which was altogether within the departmental authority of the city council.

Giving full effect to the finding of the court that the Board of Liquidation is no more than one of the departments of the city government, charged with the duty of controlling and directing matters relating to the bonded debt, it can not be doubted that full recognition will be given to its duties and powers as such; while the absence of any contract rights in the case in 109 U. S., no bonds having been issued upon the faith of the dedication of the city property there in question, to the payment of the bonded debt, there was obstacle to its use for the other purposes named in the two acts of 1882; here the case is; quite different; if there be any contract created by the act of 1890 and the constitutional amendment of 1892, and the fund thereby created is dedicated solely and exclusively to certain purposes, and to no others, in this phase there is here presented a factor which was entirely wanting in the case cited;

there can be no doubt that if, under the act of 1880, and upon the faith of the dedication thereby made, any bonds had been issued by the board prior to the adoption of the two acts of 1882, the compromise in dispute would have been set aside by this court, to the extent that it in any manner impaired the contract evidenced by the bonds, or in any degree diminished the assets set aside for their payment; considering, for the sake of argument, the Board of Liquidation as a mere branch of the city government, it is clearly charged with the duty of protecting from diversion the funds committed to its control and administration, for the reduction of the bonded debt, and other obligations created or incurred under the act of 1890, and the constitutional amendment of 1892; it is evident, that besides such, the board is charged with the duty of resisting any attempt by subsequent legislation to reduce the permanent public improvement fund, not only before the passage of the acts of 1896 and 1898, but after their adoption, from the time any obligations were incurred or bonds issued by authority thereof; it is shown by the record that many thousands of dollars of Constitutional Bonds, to the payment of which, and judgments made payable under the act of 1884, the one per cent. tax was solely and exclusively dedicated, and contracts for permanent public improvements payable out of the surplus, under the provisions of section 10 of the act of 1890, were issued and incurred prior to the adoption of the constitution of 1898; it is also shown that bonds and contracts to a large amount were issued and made by the drainage commission, under the acts of 1896 and 1898, payable out of the surplus of the 1 per cent. tax, which would manifestly be diminished if the charges necessary to carry the bonds provided by article 317 of the constitution of 1898, were added to the 1 per cent. tax, compliance with which would undoubtedly admit as burdens against the tax, Constitutional Bonds for new purposes, which tax the act of 1890 declared

should be free from all burdens except the Constitutional Bonds which it authorized; the permanent public improvement fund created by section 8 of the act of 1890, and by the acts of 1896 and 1898, being set apart for the payment of the bonds and contracts of the drainage commission, would necessarily be decreased in amount, by the addition of burdens not enumerated by the act of 1890; the surplus dedicated to the bonds and contracts of the drainage commission was the same surplus described by sections 8 and 10 of the act of 1890, and could not, without impairing the surplus, which was the source of payment of the creditors and bondholders of the drainage commission, be made any less than it was under the act of 1890; and it is obvious that this would be the result of article 317, if carried into effect, since it would increase the annual burdens of the 1 per cent. by so much as would be necessary to provide for the bonds of which it directs the issuance.

There is here no question of the power of the Board of Liquidation, such as was dealt with in the case in 109 U. S.; the argument is, that because that case declares that the board is a department of the city government, it is without authority to stand in judgment here; but it is respectfully insisted that this is not a correct view of the board's position; by the express provisions of the act of 1890, the board is made the custodian of the one per cent. tax, and its duty with reference thereto defined with great particularity; it is to carry out the purposes of that act; the amendment which this was designed to execute declares, that the Constitutional Bonds can be sold only for two purposes, and the express provision of the act is that the funds derived from the sale of the bonds shall be used solely and exclusively to take up outstanding bonds of the city of New Orleans, and to pay judgments which may be retired under act 67 of 1884; this leaves no room for the board to make any other use of the bonds, or any of the

funds, than those permitted by the statute; to issue and sell bonds under article 317 of the constitution of 1898 is a purpose beyond anything authorized either by the constitutional amendment or the act, a compliance with it would be in total disregard of all rights arising under the amendment and the act, and a clear impairment, by admitting to the benefit of its provisions a class of obligations which are excluded by their express terms; as has been shown, in this connection, in our first brief, a constitutional provision of the state stands upon no higher footing than one of its statutes, both being subordinate to the constitution of the United States.

So far as are concerned the issue of bonds and the administration of funds under its control, the Board of Liquidation is evidently a trustee for all holders of the bonds, and creditors payable out of such funds; the main purpose of its creation was to manage and control all matters relating to the city's bonded debt, in accordance with the law, and the rights thereunder of all parties brought in relation to it; the language of section 2 of the act of 1880, ordaining that the board should have exclusive direction and control of everything relating to the bonded debt of the city of New Orleans, and the confirmation of these powers found in the concluding provisions of section 11 of the act of 1890, would be devoid of meaning if it were without power to resist any attempt to divert from their lawful destination, funds which by statutory direction it was ordered to apply to certain purposes, and no others; yet, such would be the condition, if the argument of defendants in error be well founded; neither the legislature nor the people of the state of Louisiana could dismember the Board of Liquidation, as suggested in the brief of the other side, under any conditions at all, for many reasons, principal among which may be mentioned that by section 11 of the act of 1890 it is made a body corporate, with right of existence and suc-

cession until January 1st, 1943, which is a substantial provision of the act, all of which, by section 16, is declared to be a contract between the state of Louisiana, the city of New Orleans, the tax payers thereof, and each and every holder of Constitutional Bonds; the right of these latter to insist upon their interests remaining with the authority constituted by the law, under which their bonds were issued, is a contract protected by the constitution of the United States.

It might be sufficient to say, that the Supreme Court of Louisiana, in its opinion in this case, has expressly denied the claim made by defendants in error in this connection; it was an issue in that court whether or not the board was authorized to stand in judgment, as it has here; the finding of the court upon this point is set out at length on pages 30 and 31 of the original brief of plaintiff in error, from a mere reading of which it is seen with what emphasis the court rejected this contention; besides which, on more than one occasion, the board has, in the courts of Louisiana, resisted attempts to unlawfully divert funds committed to its care, and to have asserted the rights vested in it by law.

Board of Liquidation vs. City of New Orleans, 32 La. An. Rep., 915.

State ex rel. Rubira vs. Board, 35 Do., 753.

State ex rel. Board vs. City, 36 Do., 524.

Board vs. New Orleans Water Works Co., 39 Do., 202.

State ex rel. Wood vs. Board, 40 Do., 398.

The bondholders, whose interests are here concerned, are not present in this case, for the reason that it is not only the right, but the duty of the board to protect their interests under the law; it is true that these, as declared in the brief of defendants in error, have been protected by the *opinion* of the lower court, but it is equally true that they have been overridden by its *decree;* while the ungracious duty of resisting an article of the state constitu-

tion is not welcomed by plaintiff in error, it can not be shirked; it is governed, and its *cestuis que trust* are protected, by the constitution of the United States, the paramount law of the land, and it is here appealing for such relief as it may rightfully obtain.

It is respectfully insisted that the case actually before the court, is not the one which is argued in many parts of the brief of defendants in error, in its repeated references to the fact that the *opinion* of the Supreme Court of Louisiana subordinates the bonds directed to be sold by the Board of Liquidation, to discharge the indebtedness assumed by the city of New Orleans, under the provisions of article 315 of the constitution of 1898; it is exceedingly unfortunate if plaintiffs in error have failed in making it plain to the court that it is not the *opinion*, but the *decree* of the state supreme court against which complaint is directed; it has been pointed out repeatedly in this brief, that while the opinion attempts to escape any repugnancy to the federal constitution, the decree is in bald violation of it; we have pointed out that the opinion, in the face of the decretal part of the judgment, is a mere nothing, the latter being absolutely inconsistent with the former, destroying, as it does, all that the opinion purports to grant.

By section 1 of the constitutional amendment of 1892, which, in the published acts, composes, with the act to carry it into effect, act 110 of 1890, and is printed immediately before the act by which it is to be executed, in the event of its adoption by the people, it appears that the Constitutional Bonds thereby authorized are to be issued for two purposes alone, and by section 2 a one per cent. tax is required for their payment; the authorized issue may be as high as ten million dollars, but only so many bonds as might be necessary to take up valid outstanding bonds, and judgments entitled to payment under act 67 of 1884, could be put out; no bonds at all were to be issued, except for these two purposes, and the extreme limit of ten

millions was to be reached only in the event that it was so required, to retire the outstanding bonds and pay the judgments mentioned; there was no authority given to issue a single bond beyond the number required to refund the outstanding bonded debt into Constitutional Bonds, and to pay such judgments as were entitled to payment under the act of 1884; the purposes for which the bonds were to be issued at all, was as much a limitation upon the powers of the board, as was the restriction of the entire issue under all circumstances, to ten million dollars; the primary object was to put the bond and judgment debt described into the form of four per cent. bonds; the limitation of the issue to ten millions was a condition of the exercise of the power, when there was a lawful occasion to use the power at all: in putting out any bonds consideration was to be first given to the purpose; if it was not one of the two named, there was absolutely no power to sell a bond; the purpose having been ascertained to be within the amendment, there then came into play the further, and secondary consideration, that in no event could the entire isssue exceed ten millions; defendants in error deal with this phase of the case as though the principal object of the act was to provide an issue of ten millions of bonds, and that the purpose to be thereby accomplished was immaterial; it is respectfully submitted that this is a reversal of the process intended by the amendment; the question of how many bonds can be issued, arises only after there is a clear right to sell any at all; if all outstanding bonds of the city of New Orleans, and all judgments governed by the act of 1884, were retired and paid, all power under the constitutional amendment would be exhausted, and no other bond could be sold for any purpose whatever; it is quite manifest, from a clear reading of the constitutional amendment, and the act following it, that they had in view nothing more than to take up the bonded debt of the city of New Orleans,

bearing high rates of interest, by converting it into a four per cent. bond, and to provide funds for the payment of all judgments entitled thereto under the act of 1884; there was clearly no intention to provide bonds for any purpose not mentioned in the amendment, which might be thereafter conceived, either by the General Assembly or the Constitutional Convention; as has been said, by way of illustration, if every bond of the city of New Orleans outstanding when the amendment was adopted had been retired, and all judgments then rendered or thereafter to be rendered, entitled to any standing under the act of 1884, had been paid, the power of the board as to the issuance of constitutional bonds would have been exhausted, and even lifeless; the amendment has no potency for the issuance of bonds for any purpose not thereby declared.

Proceeding further, so jealous of any abuse of power, designedly or otherwise, in the employment of any part of the one per cent. tax at variance with the intention of both the people and the legislature, the prohibition as to the issue of bonds for unauthorized purposes is in effect repeated with emphasis in section 2 of act 110 of 1890, adopted to execute the proposal embodied in the amendment preceding which provides in emphatic terms that the funds derived from the sale of the bonds shall be used "solely and exclusively" for the two purposes already named, which the issue of the bonds was designed to accomplish, namely, the retirement of the then outstanding bonded debt, and the discharge of judgments governed, as to their payment, by the act of 1884.

It is quite clear that the bond issue contemplated by article 317 of the constitution of 1898 would be an impairment of the contract of the holders of Constitutional Bonds already issued, in that it would admit to participation in the one per cent. tax, which is the security of the Constitutional Bond holder, a class of bonds issued for a purpose

not authorized by the constitutional amendment; it would further impair the contract of the Constitutional Bond holder, by the use of the proceeds of the Constitutional Bonds, directed by article 317, for a purpose other than the taking up of other bonds of the city of New Orleans, and the payment of judgments which, by section 2 of the act of 1890, are declared to be the sole and exclusive purposes for which the proceeds of any Constitutional Bond can be used; the issue and sale of the bonds contemplated by article 317 would necessarily compel the holders of bonds already issued to share with the holders of the new bonds a tax which belongs exclusively to them, and the holders of other obligations mentioned by the constitutional amendment of 1892, and the act of 1890; the Constitutional Bond holder is entitled to exclude from participation in the one per cent tax any obligation not admitted thereto by the law under which he holds his bond.

The contractors for permanent public improvement with the city of New Orleans, and the creditors and bondholders of the drainage commission, the former to be paid in full before the latter begins to be paid, being both payable out of the surplus of the 1 per cent. tax, have an obvious interest in resisting any additions to the burden of the tax, which would correspondingly diminish the surplus out of which they are to be paid, and any increase of the annual charges against the body of the tax would be clearly an impairment of the contract right of all persons payable out of the remaining surplus.

The Board of Liquidation has manifest authority to resist any encroachment upon, or impairment of, the rights of any person against the 1 per cent. tax; by law it is given the possession, control and administration of this tax; it is responsible for its disbursement in accordance with the statutes by which it is governed; it would be strange indeed, if, charged with the responsibility of administering this fund in accordance

with law, the board should have no power to determine for itself what the law required it to do in the discharge of a duty imposed upon it; and should be without power to resist in the courts any demand which in its judgment is unfounded in law, and compliance with which would require a violation of duty; if the contention of defendants in error be correct upon this point, the giving to the board of full control and direction of all matters relating to the bonded debt, the specific declaration of the purposes for which the bonds can be issued, and the limitation to the two same purposes of any funds derived from the sale of Constitutional Bonds, would be devoid of meaning, and subject to possible execution, only at the sufferance of any interested person who might entertain views at variance with the board; such powers as have been given to it, it is fair to presume, were intended to be exercised, not only when not opposed by any party, but on all proper occasions, and in case of dispute as to the correctness of the board's action, it would be monstrous if it were debarred from what is freely open to the humblest citizen, that is, appeal to the judicial power for the determination of the controversy.

All debts do not stand upon the same footing as to their payment, and the contention here simply is, not that the debt of relators should not be paid at all, but that it can not be paid in the mode attempted, without violating the rights of other parties, which are protected from impairment by the federal constitution.

All persons holding contracts under the constitutional amendment, and the act of 1890, are entitled, as a matter of right, to any and all benefit or advantage which is given by that legislation; if it happen that only nine million dollars of bonds, and not ten millions, which could have been used for the purpose if necessary, have been sufficient up to now to pay and discharge the then outstanding debt of the city of New Orleans, and such judgments as have up to this time been rendered against

the city, payable under the act of 1884, it is clearly their property right to enjoy the 1 per cent. tax in fullness and entirety, since the express provision of the constitutional amendment authorizing the bonds is that only so much of the ten millions fixed as the extreme limit should be used as might be necessary to effect the two purposes which the amendment was intended to accomplish; it is no answer to this to say that no injury results to the holders of the Constitutional Bonds, that the total of ten millions originally accepted to be necessary should be employed to pay relators' claims; to do this would be using the bonds for purposes never intended, and the holder of every Constitutional Bond has the right to restrain their further issue to the objects which they were intended to accomplish, and no other; it would have been far better for the constitutional convention to have authorized a new bond, and provided for it a source of payment; there is a still stronger objection, which would come upon the holders of the drainage bonds, and the owners of contracts made by it; these are payable out of the surplus, aud the necessary and obvious result of increasing the Constitutional Bonds, by their issuance for purposes not originally intended, would be to diminish the surplus out of which they are payable; if the surplus is not that so clearly defined by the act of 1890, but is such as will remain after the addition of charges established subsequent to the amendment of 1892, and the act of 1890, it is evident that their source of payment can be made quite different, much less than they were justified in considering it when they took their bonds, or made their contracts.

Respectfully submitted,

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